

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

HERB OUSLEY, Individually and)
JULIE DEAN, as Special Administrator)
of the Estate of Shermalee Ousley,)
Deceased,)
)
Plaintiffs,)
)
v.) **CAUSE NO. 05-CV-806-WDS**
)
PHILLIP MORRIS USA, INC.,)
)
Defendant.)

O R D E R

STIEHL, District Judge:

Before the Court is the defendant's motion to strike plaintiff's notice of voluntary dismissal.

Defendant electronically filed its answer and certificate of service on November 10, 2005, at 11:54 a.m. Plaintiff filed its Notice of Dismissal on November 10, 2005, at 12:04 p.m. The case was then closed by the Office of the Clerk of the Court.

Defendant has filed a motion to strike the Notice of Dismissal, arguing that under Rule 41(a)(1) of the Federal Rules of Civil Procedure, plaintiff is not permitted to voluntary dismiss this action as the defendant served its answer prior to the filing of the notice. Defendant's argument is well-taken. As defendant served its answer prior to the filing of the notice of voluntary dismissal, this case was improvidently closed by the Office of the Clerk of the Court. Accordingly, the Notice of Dismissal, which the Court construes as a motion for voluntary dismissal under Fed. R. Civ. P. Rule 41(a)(2), remains pending.

Upon review, the Court **GRANTS** plaintiff's motion for voluntary dismissal (Doc. 4).

This action is **DISMISSED** without prejudice, subject to the following conditions. Should plaintiff refile this action, the complaint must be filed in this Court. Further, plaintiff shall bear the costs incurred by defendant in preparing its answer. Defendant's motion to strike the Notice of Dismissal (Doc. 6) is **DENIED**.

IT IS SO ORDERED.

DATED: November 28, 2005.

s/ WILLIAM D. STIEHL
DISTRICT JUDGE